Supreme Court, U.S.
FILED
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(3) (3)

Nos. 98-1046 and 98-1153

# In the Supreme Court of the United States

OCTOBER TERM, 1998

BELLSOUTH CORPORATION, PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

U S WEST, INC., PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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## QUESTION PRESENTED

Whether 47 U.S.C. 274—which provides that, until February 8, 2000, a Bell Operating Company (BOC) and its affiliates may engage in electronic publishing disseminated through the BOC's own basic telephone service only by means of a separated affiliate or joint venture—violates the Bill of Attainder Clause or the First Amendment.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 21 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) | 5 |
| *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987) | 15 |
| *BellSouth Corp.* v. *FCC*, 162 F.3d 678 (D.C. Cir. 1998) | 9, 13, 14 |
| *Edenfield* v. *Fane*, 507 U.S. 761 (1993) | 17-18 |
| *Flemming* v. *Nestor*, 363 U.S. 603 (1960) | 11 |
| *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) | 15 |
| *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) | 12 |
| *North Am. Co.* v. *SEC*, 327 U.S. 686 (1946) | 10 |
| *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) | 12, 14 |
| *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) | 12 |
| *SBC Communications, Inc.* v. *FCC*, 154 F.3d 226 (5th Cir. 1998), cert. denied, 119 S. Ct. 889 (1999) | 8, 9, 12, 13, 14, 17 |
| *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984) | 7, 10 |
| *Turner Broad. Sys.* v. *FCC*: | |
| 512 U.S. 622 (1984) | 10, 14, 15, 17, 18, 20 |
| 520 U.S. 180 (1997) | 17, 19, 20 |

Cases—Continued: Page

*United States* v. *AT&T Co.*:
524 F. Supp. 1336 (D.D.C. 1981) ..... 2
552 F. Supp. 131 (D.D.C. 1982), aff'd *sub nom.* *Maryland* v. *United States*, 460 U.S. 1001 (1983) ..... 2, 3, 18
*United States* v. *Brown*, 381 U.S. 437 (1965) ..... 10
*United States* v. *Western Elec. Co.*:
673 F. Supp. 525 (D.D.C. 1987) ..... 3
714 F. Supp. 1 (D.D.C. 1988) ..... 3
767 F. Supp. 308 (D.D.C. 1991) ..... 4
900 F.2d 283 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990) ..... 3, 4
993 F.2d 1572 (D.C. Cir.), cert. denied, 510 U.S. 984 (1993) ..... 4, 18, 19
*Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989) ..... 16, 17, 20

Constitution and statutes:

U.S. Const.:
Art. I, § 9, Cl. 3 (Bill of Attainder Clause) ..... 7
Amend. I ..... 7, 8, 14, 15, 16
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... 5, 6, 13
47 U.S.C. 152 note (Supp. II 1996) (§ 601a, 110 Stat. 143) ..... 5
47 U.S.C. 153(4) (Supp. II 1996) ..... 5
47 U.S.C. 271 ..... 5, 9
47 U.S.C. 273 ..... 5
47 U.S.C. 274 ..... *passim*
47 U.S.C. 274(a) ..... 6
47 U.S.C. 274(b)(5) ..... 6
47 U.S.C. 274(c)(2)(C) ..... 6
47 U.S.C. 274(g)(2) ..... 6, 9
47 U.S.C. 274(h)(1) ..... 16
47 U.S.C. 274(h)(2)(O) ..... 16
47 U.S.C. 274(i)(2) ..... 6
47 U.S.C. 274(i)(5) ..... 6

Statutes—Continued: Page

47 U.S.C. 274(i)(9) ..... 6
47 U.S.C. 274(i)(10) ..... 5
47 U.S.C. 275 ..... 5, 9

Miscellaneous:

*Communications Law Reform: Hearings Before the Subcomm. on Telcomm. and Fin. of the House Comm. on Commerce*, 104th Cong., 1st Sess. (1995) ..... 19
140 Cong. Rec. H5212 (daily ed. June 28, 1994) ..... 17
142 Cong. Rec.:
p. S393 (daily ed. Jan. 26, 1996) ..... 13
p. S696 (daily ed. Feb. 1, 1996) ..... 13
p. S699 (daily ed. Feb. 1, 1996) ..... 13
H.R. Rep. No. 850, 102d Cong., 2d Sess. (1992) ..... 4, 19
H.R. Rep. No. 559, 103d Cong., 2d Sess. (1994):
Pt. 1 5, 17, 19
Pt. 2 19
H.R. Rep. No. 203, 104th Cong., 1st Sess., Pt. 1 (1995) ..... 19
H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1 (1995) ..... 12-13, 19
*In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 11 F.C.C.R. 18,959 (Notice of Proposed Rulemaking July 18, 1996) ..... 6-7
*In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 12 F.C.C.R. 5361 (First Report and Order and Further Notice of Proposed Rulemaking Feb. 7, 1997) ..... 7
*National Communications Infrastructure (Part 3): Hearings Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. (1994) ..... 19

Miscellaneous—Continued: Page

*S. 1822, The Communications Act of 1994: Hearing Before the Senate Comm. on Commerce, Science and Transp.*, 103d Cong., 2d Sess. (1994) ..... 19
S. Rep. No. 367, 103 Cong., 2d Sess. (1994) ..... 16
*Telecommunications Policy Act (Part I): Hearing Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) ..... 10
Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) ..... 11

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No. 98-1046

BELLSOUTH CORPORATION, PETITIONER

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**BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a[1]) is reported at 144 F.3d 58. The First Report and Order

[1] "BellSouth Pet." refers to the petition for a writ of certiorari in No. 98-1046; "U S WEST Pet." refers to the petition for a writ of certiorari in No. 98-1153. "Pet. App." refers to the appendix to the petition in No. 98-1046.

of the Federal Communications Commission (Pet. App. 33a-190a) is reported at 12 F.C.C.R. 5361.

## JURISDICTION

The judgment of the court of appeals was entered on May 15, 1998. On June 29, 1998, petitioners filed petitions for rehearing, which were denied on October 20, 1998. Pet. App. 191a-194a. The petition for a writ of certiorari in No. 98-1046 was filed on December 28, 1998, and the petition for a writ of certiorari in No. 98-1153 was filed on January 19, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. For many years, most telephone service in the United States—both local and long-distance—was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local telephone markets to impede competition in the long-distance market. See *United States* v. *AT&T Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree—which became known as the Modification of Final Judgment, or MFJ—that required it to divest its local exchange operations. The newly independent Bell Operating Companies (BOCs) continued to provide monopoly local exchange service in their respective regions, while AT&T continued to provide nationwide long-distance service. The BOCs were initially grouped into seven corporate entities known as "Regional Bell Operating Companies," or RBOCs. See *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). After recent mergers, that

number now stands at five: Bell Atlantic, BellSouth, SBC Communications, Ameritech, and U S WEST.

The consent decree, overseen for many years by the federal district court in Washington, D.C., prohibited the BOCs from providing "inter-LATA" (long-distance) telephone service, manufacturing telecommunications equipment, and providing information services, including electronic publishing. In approving the decree's restriction on the provision of information services, the district court explained that a BOC, if permitted to enter the information services market, could use its monopoly control over local telephone facilities (through which information services are largely provided) to impede competition in two principal ways: The BOC could subject competitors to discriminatory terms of access to the local telephone network, and it could cross-subsidize its own information services with its monopoly local revenues. *AT&T*, 552 F. Supp. at 189.

The Department of Justice subsequently joined with the BOCs in requesting that the decree's information services restriction be lifted. Although the district court initially rejected that request, see *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 562-567 (D.D.C. 1987); *United States* v. *Western Elec. Co.*, 714 F. Supp. 1, 3-5 (D.D.C. 1988), the court of appeals held that because the proposed modification was uncontested by any of the parties to the decree, the district court was obligated to approve it "so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." *United States* v. *Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir.) (citation omitted), cert. denied, 498 U.S. 911 (1990). The appeals court acknowledged that "the district court had before it evidence to support its findings

on the risk of discrimination and cross-subsidization." *Id.* at 308. On the other hand, the court added, "the record also contains considerable evidence cutting the other way." *Ibid.* Rather than "resolving these disputed factual issues," *ibid.*, the court remanded the case to the district court for further proceedings, *id.* at 309.

On remand, the district court lifted the information services restriction. *United States* v. *Western Elec. Co.*, 767 F. Supp. 308, 332 (D.D.C. 1991). The district court stated that the RBOCs continued to derive market power "from their still almost complete domination over the 'last mile' of the telephone network, *i.e.*, their monopoly of the local wires and switches," without which most competitors could not reach the ultimate consumers of telephone-based information services. 767 F. Supp. at 314. The court also believed that to lift the restriction "would be to court a significant risk of anticompetitive activities on a substantial scale," as well as to invite the RBOCs to "divert ratepayer funds to its * * * information services activities," thereby "enabl[ing] the company to undersell its independent rivals in the information services market long and effectively enough to drive them from the market." *Id.* at 324. Nonetheless, the court felt bound by the court of appeals' mandate to lift the restriction, because it could not be "*certain*" that removing it would damage competition. *Id.* at 331. The court of appeals affirmed. *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir.), cert. denied, 510 U.S. 894 (1993).

2. Meanwhile, Congress itself began reexamining the issues raised by the consent decree, including the necessity for an information services restriction. See, *e.g.*, H.R. Rep. No. 850, 102d Cong., 2d Sess. 1-2, 7, 15 (1992). Those efforts eventually produced legislative proposals to require the BOCs to employ separate

affiliates or joint ventures if they wished to provide "electronic publishing" (a subset of information services) through their own basic telephone service. See, *e.g.*, H.R. Rep. No. 559, 103d Cong., 2d Sess., Pt. 1, at 55-59 (1994) (discussing H.R. 3626, § 203).

Those proposals were ultimately enacted as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), which comprehensively reforms telecommunications regulation in the United States. See generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S. Ct. 721 (1999). Among other things, the 1996 Act prospectively eliminates the restrictions of the consent decree. § 601(a), 110 Stat. 143. It automatically entitles all BOCs to provide, for the first time, "out-of-region" long-distance services (*i.e.*, long-distance services originating outside the States in which a BOC was authorized to provide local telephone service on the date of the statute's enactment); and it establishes a mechanism by which any BOC may seek to provide, also for the first time, full long-distance telephone service originating within its "in-region" States. 47 U.S.C. 271.[2] The statute further establishes the conditions under which a BOC may engage in the manufacture of telecommunications and customer premises equipment. 47 U.S.C. 273; see also 47 U.S.C. 275 (short-term

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[2] The 1996 Act defines "Bell operating company" as 20 listed local telephone companies that had been wholly-owned subsidiaries of the pre-divestiture AT&T, as well as "any successor or assign of any such company that provides wireline telephone exchange service." 47 U.S.C. 153(4) (Supp. II 1996); see also 47 U.S.C. 274(i)(10). The definition includes "South Central Bell Telephone Company" and "Southern Bell Telephone and Telegraph Company," 47 U.S.C. 153(4) (Supp. II 1996), both of which are wholly-owned subsidiaries of petitioner BellSouth Corporation, and also includes "U S West Communications Company." *Ibid.*

restriction on BOC alarm-monitoring services). Finally, the interim provision challenged here, Section 274, governs BOC provision of "electronic publishing":

> No Bell operating company or any affiliate may engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing.

47 U.S.C. 274(a). By its terms, Section 274 expires "4 years after February 8, 1996," the date of the 1996 Act's enactment. 47 U.S.C. 274(g)(2).

Even while it is in effect, Section 274 permits a BOC to provide electronic publishing in two ways. First, a BOC may provide its own electronic publishing services without restriction so long as it does not disseminate such publishing by means of its "basic telephone service." 47 U.S.C. 274(a); see 47 U.S.C. 274(i)(2). Second, electronic publishing services may be provided even through a BOC's basic telephone service so long as the service comes from a "separated affiliate," see 47 U.S.C. 274(i)(9), or an "electronic publishing joint venture," see 47 U.S.C. 274(i)(5), operated in accordance with the statute's requirements. See 47 U.S.C. 274(b)(5); 274(c)(2)(C).

3. On July 18, 1996, the FCC began a rulemaking proceeding to implement several provisions of the 1996 Act, including Section 274. *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 11 F.C.C.R. 18,959 (Notice of Proposed

Rulemaking). In that proceeding, BellSouth and U S WEST argued that Section 274's separation requirements violate the First Amendment and the Bill of Attainder Clause. See U.S. Const. Art. I, § 9, Cl. 3. The FCC considered and rejected those constitutional contentions. *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 12 F.C.C.R. 5361, 5376 (¶ 37) (First Report and Order and Further Notice of Proposed Rulemaking Feb. 7, 1997) (Pet. App. 53a-54a). Joined by intervenor U S WEST, BellSouth filed a petition for review.

4. The court of appeals denied BellSouth's petition for review and upheld Section 274's constitutionality. Pet. App. 1a-32a. The court first rejected the contention that Section 274 is an unconstitutional bill of attainder. Applying the three-part test contained in *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984), the court found that Section 274 does not impose "punishment" within the meaning of the constitutional proscription. The court first rejected the contention that Section 274 should be placed "among the burdens historically forbidden as attainders." Pet. App. 12a-13a. It explained that the provision "does not bar the BOCs from electronic publishing but simply requires structural separation," (*id.* at 13a), and that even if the provision had unconditionally restricted the BOCs from providing electronic publishing services, it would be "nothing more than a line-of-business restriction" (*id.* at 12a). The court next found that Section 274 could "reasonably be said to further nonpunitive legislative purposes." Pet. App. 13a. Indeed, the court observed, by imposing a structural separation requirement, "§ 274 has the earmarks of a rather conventional response to com-

monly perceived risks of anticompetitive behavior." *Id.* at 14a. Finally, the court found that the "few scattered remarks referring to anticompetitive abuses allegedly committed by the BOCs in the past" did not constitute the "unmistakable evidence of punitive intent" required to support a bill of attainder claim. *Id.* at 17a-18a.

The court of appeals also rejected the claim that Section 274 violates the First Amendment. Pet. App. 18a-25a. Applying intermediate scrutiny, the Court found that the interest underlying Section 274—"to promote competition by discouraging discrimination and cross-subsidization by the BOCs"—is both "important" and "unrelated to the suppression of free speech." Pet. App. 22a. "[I]ndeed," the Court observed, "the interest in preventing truly anticompetitive behavior in the electronic publishing marketplace is an interest in the enhancement of speech." *Id.* at 22a-23a.

Judge Sentelle dissented from the appeals court's rejection of petitioners' bill of attainder claims (Pet. App. 25a-32a), but "agree[d] with the majority's analysis and with its conclusion" on the First Amendment issues (*id.* at 25a).

## ARGUMENT

1. The Fifth Circuit recently rejected constitutional challenges to provisions of the 1996 Act, including Section 274, applicable specifically to the BOCs. See *SBC Communications, Inc.* v. *FCC*, 154 F.3d 226 (1998); see also note 3, *infra*. On January 19, 1999, three weeks after the petition in No. 98-1046 was filed and on the same day that the petition in No. 98-1153 was filed, this Court denied certiorari in *SBC Communications*. See 119 S. Ct. 889 (Nos. 98-652 and 98-653). Nothing has happened in the intervening weeks to make certiorari more appropriate now than it was then.

Indeed, this case is an even less appropriate candidate for certiorari than was *SBC Communications*. Unlike that case, which involved the constitutionality of Sections 271 through 275, this case involves a challenge only to Section 274. By its terms, Section 274 will expire less than a year from now: on February 8, 2000. See 47 U.S.C. 274(g)(2). Any decision by this Court would thus have very limited practical significance, even if the decision could be issued before the parties' dispute becomes moot. This Court does not ordinarily grant certiorari to consider challenges to provisions that will expire of their own force shortly after—or perhaps even before—the Court could render a decision on the merits. For that reason alone, the petitions should be denied.

2. As in *SBC Communications*, the BOCs challenge Section 274 as an unconstitutional bill of attainder.[3] That challenge is without merit for the reasons set forth in the opinion below and in our brief in opposition to certiorari in *SBC Communications*. See 98-652 U.S. Br. in Opp. at 8-16. Rather than repeat our earlier discussion in its entirety, we provide only a summary here.[4]

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[3] To date, three different court of appeals panels have rejected the BOCs' bill-of-attainder challenges to various provisions of the 1996 Act: the Fifth Circuit panel in *SBC Communications*, the panel below, and another panel of the D.C. Circuit in *BellSouth Corp.* v. *FCC*, 162 F.3d 678 (1998). The latter case involved a challenge to Section 271, and the D.C. Circuit rejected that challenge without viewing the decision below, which addresses only Section 274, as controlling authority. See *id.* at 683.

[4] We have served counsel for petitioners with copies of our brief in opposition in *SBC Communications*. (Counsel of record for BellSouth was also counsel of record for SBC Communications in the previous case.)

A statute is a prohibited "bill of attainder" only if it both applies with specificity *and* imposes punishment. *E.g., Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984). The flaw in petitioners' bill-of-attainder challenge here is basic: nothing in the challenged provisions can plausibly be characterized as "punishment." To support their contrary conclusion, petitioners mistakenly rely on cases involving the imposition of punitive disabilities on adherents of a vilified political movement—either the Confederacy or the Communist Party—that was "thought to present a threat to the national security." *United States* v. *Brown*, 381 U.S. 437, 453 (1965); see 98-652 U.S. Br. in Opp. at 9. This case has nothing in common with those. Line-of-business regulations based on corporate economic power and incentives, unlike sanctions based on a flesh-and-blood individual's political affiliation, are a legal commonplace. See, *e.g.*, *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 664 (1994) (*Turner I*). They rest not on a desire to "punish" the regulated corporations, but on a recognition of the objective dangers posed by monopoly power. See *North Am. Co.* v. *SEC*, 327 U.S. 686, 711 (1946). Here, as one former FCC chairman told Congress, line-of-business restrictions were needed "not because the BOCs are venal," but because, in the absence of such restrictions, "they would be following the natural instincts of rational businessmen" in using their monopoly power to defeat competition. *Telecommunications Policy Act (Part I): Hearing Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 427 (1990) (testimony of Richard E. Wiley).

Moreover, "[p]lacing § 274 among the burdens historically forbidden as attainders seems especially

dubious because it does not bar the BOCs from electronic publishing but simply requires structural separation." Pet. App. 12a-13a. Under the statute, petitioners are free to establish a wholly-owned subsidiary to engage in electronic publishing—or to engage in electronic publishing directly—so long as they observe the statute's structural separation requirements. *Id.* at 13a. "While structural separation is hardly costless, neither does it remotely approach the disabilities that have traditionally marked forbidden attainders." *Ibid.*[5]

Because they cannot plausibly characterize the challenged provisions as "punitive," petitioners devote much of their discussion to the provisions' specificity, as

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[5] BellSouth seeks to minimize the fact that Section 274 permits other "member[s] of the BellSouth corporate family (outside of the BOC's control)" to engage in electronic publishing, reasoning that the statute "is a complete prohibition" on the ability of its BOC subsidiaries and their affiliates to provide electronic publishing over their local telephone networks. BellSouth Pet. 21; see also U S WEST Pet. 20-21. But there can be no dispute that the statute "leaves all the investors with stakes in the BOCs (i.e., the shareholders of the RBOCs) free to pursue their collective electronic publishing ends, and to aggregate their capital to achieve those ends, subject only to structural separation requirements." Pet. App. 13a. Moreover, even if corporate line-of-business restrictions of this sort could be plausibly compared to professional disabilities imposed on flesh-and-blood individuals, it is well-settled that even the latter kinds of disabilities are permissible "when the nonpunitive aims of an apparently prophylatic measure have seemed sufficiently clear and convincing." Laurence H. Tribe, *American Constitutional Law* § 10-5, at 655 (2d ed. 1988). "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." *Flemming* v. *Nestor*, 363 U.S. 603, 614 (1960).

though specificity alone could convert a nonpunitive statute into a bill of attainder. But the need to show specificity and the need to show punitiveness are separate requirements for any bill-of-attainder challenge, and there is "no warrant in the precedents for treating Congress's specification of the BOCs by name as a material element in the punishment analysis." Pet. App. 10a. Indeed, petitioners' argument is irreconcilable with *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). There, this Court rejected the notion that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality," *id.* at 469-470, and it observed that a variety of valid statutes "single out identifiable members of groups to bear burdens or disqualifications," *id.* at 471 n.34 (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974)). Similarly, in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court reaffirmed that a valid bill-of-attainder challenge "requires not merely 'singling out' but also *punishment*." *Id.* at 239 n.9 (emphasis in original). In the absence of punishment, Congress may legislate not just with great specificity, but may in fact "legislate a legitimate class of one." *Ibid.* (internal quotation marks omitted).

There is similarly no merit to petitioners' challenge to the rationality of Congress's distinction between the BOCs and the other local exchange carriers for purposes of regulations guarding against discrimination and cross-subsidization. As we discuss in our brief in opposition in *SBC Communications*, Congress had ample reason to differentiate between the local exchange progeny of the Bell System, which "provide over 80% of local telephone service in the United States" (H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt.

1, at 49 (1995)), and the so-called "independent" carriers, which generally serve markets that are more widely dispersed or lower in population density. See 98-652 U.S. Br. in Opp. at 9-10, 17-20. As the court of appeals recognized, the statute's "differential treatment of the BOCs and non-BOCs," including GTE Corporation, is "neither suggestive of punitive purpose nor particularly suspicious." Pet. App. 17a; accord *SBC Communications*, 154 F.3d at 243; *BellSouth Corp.*, 162 F.3d at 689-690. And, although BellSouth takes issue (Pet. 19-20) with the court's analysis of the risks posed specifically by the BOCs, it cannot reasonably suggest that those risks are "so feeble that no one could reasonably assert them except as a smokescreen for some invidious purpose (much less for the specific invidious purpose of 'punishing' the BOCs)." Pet. App. 15a-16a.

Finally, any assertion of punitive purpose is "undermined by § 274's placement in an Act that as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing in § 271 a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." Pet. App. 14a. Indeed, the final version of the 1996 Act as a whole was supported by the BOCs and their holding company parents. See *SBC Communications*, 154 F.3d at 244; see also 142 Cong. Rec. S393 (daily ed. Jan. 26, 1996) (statement of Sen. Pressler); *id.* at S696 (daily ed. Feb. 1, 1996) (statement of Sen. Kerrey); *id.* at S699 (statement of Sen. Lott). The BOCs' support for the 1996 Act suggests that they too recognized that the limitations imposed by Section 274's structural restrictions were "part of a larger quid pro quo" (*SBC Communications*, 154 F.3d at 244) that liberated them from the long-distance and manufacturing restrictions of the consent decree and, on the whole, benefited, rather than

harmed, their corporate interests. See also *BellSouth Corp.*, 162 F.3d at 690-691.[6]

3. Like the Fifth Circuit in *SBC Communications*,[7] the court of appeals also correctly rejected petitioners' contention that Section 274 violates the First Amendment. "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner I*, 512 U.S. at 657. Here, Section 274 imposes short-term structural protections concerning the manner in which the BOCs may engage in the provision of electronic publishing services, regardless of the message or views being transmitted. Those interim protections are entirely consistent with the First Amendment; indeed, as the court of appeals recognized, "the interest in preventing truly anticompetitive behavior in the electronic publishing marketplace is an interest in the enhancement of speech." Pet. App. 22a-23a.

a. Petitioners contend that Section 274 is subject to strict First Amendment scrutiny because it applies to the electronic publishing activities of a specific group of companies. See BellSouth Pet. 24-25; U S WEST Pet.

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[6] U S WEST contends (Pet. 27) that the decision below "infringe[s] on the constitutional separation of powers." U S WEST has not clearly preserved, and the court of appeals did not address, any separation-of-powers argument distinct from the bill-of-attainder challenge. In any event, Section 274 presents no separation-of-powers concerns. See generally 98-652 U.S. Br. in Opp. at 20-22; see also *Plaut*, 514 U.S. at 239 & n.9.

[7] That court ruled that petitioners' First Amendment challenge was "entirely lacking in merit," 154 F.3d at 247, a holding that went unchallenged in the petitions for certiorari in that case.

11-15. But laws favoring some speakers over others are subject to strict scrutiny only "when the legislature's speaker preference reflects a content preference." *Turner I*, 512 U.S. at 658. Strict scrutiny is unwarranted when "the differential treatment is 'justified by some special characteristic of' the particular medium being regulated." *Id.* at 660-661 (citation omitted).[8] In this case, Congress focused on the BOCs not because of any particular message they might convey, but because of the nature of their monopoly control over the local telephone lines on which electronic publishers rely to reach the ultimate consumers of their information. Because the BOCs' "bottleneck monopoly power" (*id.* at 661) poses a distinct threat to independent electronic publishers, and because Section 274 is designed to address that specific threat, the fact that Section 274 applies only to the BOCs poses no First Amendment concern.[9]

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[8] Petitioners' reliance on *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), is unsound. Those cases "mean[] only that strict scrutiny must be applied to regulations that target a small subset of media organizations in ways that threaten to 'distort the market for ideas,'" a concern that is absent here. Pet. App. 20a (quoting *Turner I*, 512 U.S. at 660). As this Court recently reaffirmed, "[i]t would be error to conclude * * * that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner I*, 512 U.S. at 660.

[9] BellSouth complains (Pet. 25 & n.15) that Congress acted improperly in not extending Section 274 to non-BOC carriers such as GTE. As discussed above, however, Congress had a legitimate basis for distinguishing between the local-exchange successors to the Bell System, with their collective 80% market share, and the "independent" telephone companies. See pp. 12-13, *supra*. More-

Nor is Section 274 subject to strict scrutiny on the theory that it is "content-based." Cf. BellSouth Pet. 25-26. To the contrary, the statute applies comprehensively to all forms of electronic publishing, whatever the views or content expressed. See S. Rep. No. 367, 103d Cong., 2d Sess. 82 (1994) (explaining that the statute applies "to all content-based information services generally thought of as electronic publishing regardless of their subject matter"). It is true that one must examine whether the information that the BOC proposes to transmit is one of the types of information listed in the statute's definition of "electronic publishing." But that does not render Section 274 a content-based speech restriction. The statutory definition contains Congress's identification of the *industry* to be regulated—"electronic publishing." And because electronic publishing is an industry that provides information, Congress necessarily had to specify the types of information generally thought to be provided by the companies in the relevant market. It is for that reason, and not because of a governmental desire to suppress certain ideas, that the statute applies to "news" or "legal materials," 47 U.S.C. 274(h)(1), but not to "[v]ideo programming or full motion video entertainment on demand." 47 U.S.C. 274(h)(2)(O). The former were seen to be part and parcel of electronic publishing; the latter was not.

Moreover, "[t]he principal inquiry in determining content neutrality * * * is whether the government

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over, BellSouth cannot explain how that distinction could conceivably raise issues under the *First Amendment*, since there is no basis for speculating that the views or ideas transmitted by BOCs would be different from those transmitted by non-BOC telephone companies.

has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); see *Turner I*, 512 U.S. at 642. Thus, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. In other words, "[g]overnment regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech." *Ibid.* (internal quotation marks and citation omitted). Here, Congress enacted Section 274 to "guard against discrimination [and] to prevent cross subsidization" by the BOCs in providing electronic publishing services (H.R. Rep. No. 559, 103d Cong., 2d Sess., Pt. 1, at 25 (1994))—*i.e.*, "to ensu[e] that the regional Bell operating companies do not exploit their monopolies to unfairly disadvantage competitors in the electronic publishing field." 140 Cong. Rec. H5212 (daily ed. June 28, 1994) (statement of Rep. Bryant). As the court of appeals recognized, that purpose "is independent of content and viewpoint." Pet. App. 22a; accord *SBC Communications*, 154 F.3d at 247; see generally *Turner I*, 512 U.S. at 643-652.

b. "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 189 (1997) (*Turner II*). BellSouth contends that, even if intermediate scrutiny applies, there is insufficient evidence that the harms sought to be addressed by Section 274 "are real and that its restriction will in fact alleviate them to a material degree." BellSouth Pet. 26 (quoting *Eden-*

*field* v. *Fane*, 507 U.S. 761, 770-771 (1993)). That argument is without merit.

Section 274 promotes competition by guarding against the risk that the BOCs might leverage their monopoly power over local telephone lines to the detriment of competition in electronic publishing. As this Court has emphasized, "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Turner I*, 512 U.S. at 664. Congress had persuasive evidence that, if left unregulated, the BOCs would likely have the incentive and ability to impede competition and the free flow of information in the electronic publishing industry.

For example, Congress knew from the opinions of the district court administering the consent decree that the BOCs were able to use their monopoly control over local telephone lines to discriminate against competing providers of information services "by providing more favorable access to the local network for their own information services than to the information services provided by competitors," as well as by "subsidiz[ing] the prices of their [information] services with revenues from the local exchange monopol[ies]." *United States* v. *AT&T*, 552 F. Supp. at 189.[10] Congress relied in part on

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[10] In affirming the district court's subsequent approval of the Justice Department's request to lift the information services prohibition, the court of appeals did not determine that removal of the information services restriction was the only possible policy outcome, but found only that the removal request "had substantial factual support and was grounded in reasonable analysis." *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1581 (D.C. Cir.), cert. denied, 510 U.S. 984 (1993). Indeed, the D.C. Circuit emphasized

the record assembled in those judicial proceedings in formulating Section 274's safeguards.[11] Congress also heard extensive testimony by market participants, including the Newspaper Association of America and the Electronic Publishers Group, concerning the need for temporary statutory protections.[12] This Court "need not put [its] imprimatur on Congress' economic theory in order to validate the reasonableness of its judgment." *Turner II*, 520 U.S. at 208. And Congress is not "obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Id.* at 213 (citation omitted). It is sufficient that, as here, Section 274's "content-neutral regulations * * * [are] grounded on reasonable factual findings supported by

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that "proponents of the entry ban submitted affidavits in its favor" (*ibid.*); that it was not the court's role "to choose among the opposing positions of distinguished economists" (*ibid.*); that the court was not called upon "to determine whether removal of the information services ban is an optimizing move" (*id.* at 1582); and that "[t]he distinguished experts marshalled by the appellants may, in the eyes of an omniscient being, be 'right'" (*ibid.*).

[11] See, *e.g.*, H.R. Rep. No. 559, *supra*, Pt. 1, at 32-34; H.R. Rep. No. 559, *supra*, Pt. 2, at 24-25; see also H.R. Rep. No. 204, *supra*, Pt. 1, at 49; H.R. Rep. No. 203, 104th Cong., 1st Sess., Pt. 1, at 13-14 (1995); see also H.R. Rep. No. 850, *supra*, at 56-58.

[12] See *Communications Law Reform: Hearings Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Commerce*, 104th Cong., 1st Sess. 454 (1995) (testimony of Robert W. Decherd); *S. 1822, The Communications Act of 1994: Hearing Before the Senate Comm. on Commerce, Science and Transp.*, 103d Cong., 2d Sess. 136 (1994) (testimony of Sandra Weis); *id.* at 115 (testimony of Frank Bennack, Jr.); accord *National Communications Infrastructure (Part 3): Hearings Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 5-18 (1994) (testimony of Frank Bennack, Jr.); *id.* at 34-46 (testimony of George M. Perry).

evidence that is substantial for a legislative determination." *Id.* at 224.

Finally, BellSouth maintains (Pet. 28-29) that Congress should have addressed "[t]he dangers of improper cost allocation and discrimination" through "nonstructural safeguards." It is settled, however, that "content-neutral regulations are not 'invalid simply because there is some imaginable alternative that might be less burdensome on speech.'" *Turner II*, 520 U.S. at 217 (citation omitted); *Ward*, 491 U.S. at 797. It is enough that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" and does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799 (citation omitted); accord *Turner II*, 520 U.S. at 217-218; *Turner I*, 512 U.S. at 662. As the court of appeals found, "[i]t is at least plausible that structural separation will more effectively meet the perceived anticompetitive threat than would lesser restrictions." Pet. App. 23a. That choice among legislative remedies was for Congress to make.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1999